4-1901-3117-2
OSHRB Docket No. 2585

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

John B. Lennes, Jr., Commissioner,
Department of Labor and
Industry, State of Minnesota,

Complainant,

vs.

Electrical Steel Elevator, a
Division of ConAgra-Peavey,

Respondent.

FINDINGS OF FACT,
CQNCLUSIONS OF
LAW AND DECISION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on October 10 and 11, 1990, and January 29 and 30, 1991 at the Office of Administrative Hearings, Minneapolis, Minnesota. The record on this matter closed on May 3, 1991, the date of receipt of the last post-hearing submission.

Nancy J. Leppink, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Complainant, Minnesota Department of Labor and Industry. Dean G. Kratz, from the firm of McGrath, North, Mullin & Kratz, P.C., Suite 1100, One Central Park Plaza, 222 South Fifteenth Street, Omaha, Nebraska 68102, appeared on behalf of the Respondent, Electric Steel Elevator.

Notice is hereby given, pursuant to Minn. Stat. 182.664, subd. 5, that the Findings of Fact and Decision of the Administrative Law Judge may be appealed to the Minnesota Occupational Safety and Health Review Board by the Employer, Employee or other authorized representatives within thirty (30) days following the publication of said Findings and Decision. The procedure for appeal is set out at Minn. Rule 5215.4900 - 5215-5250.

5TATEMENT-OF ISSUES

The issues to be determined in this proceeding are whether the Respondent willfully violated 29 C.F.R. 1910.22(a)(1) and 29 C.F.R. 1910.307(b), and committed a non-serious violation of Minn. Rule 5210.0660 (1987) on March 22, 1988.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On March 22, 1988, Senior Occupational Safety and Health Investigators Steven Sobolewski and Roy Miner conducted an Occupational Safety

and Health inspection of Respondent's grain elevator located at 600 - 25th Avenue Southeast, Minneapolis, Minnesota. This grain elevator is a large grain handling and storage facility with a capacity of approximately four million bushels. At the time of the inspection, the elevator was handling commodities consisting of approximately 95% barley and 5% wheat.

2. This Occupational Safety and Health inspection was scheduled as a result of a referral from the Minneapolis Fire Department which had reported to the Complainant that it (the fire department) had responded to a fire at the grain elevator on March 2, 1988. This report from the fire department stated that "the source and cause of the fire appeared to be grain dust on an overheated bearing." The report stated further that there were excessive accumulations of grain dust throughout the elevator and that these conditions Were Hpotentially explosive".

3. Upon arrival at the grain elevator on March 22, 1988, Sobolewski and Miner met with the plant superintendent, Dale West, presented him with their credentials, informed him of the basis for their inspection and conducted an opening conference.

4. During the opening conference, Mr. West was questioned concerning how often the grain elevator was cleaned. West responded that necessary cleaning was identified by a weekly walkthrough inspection and that the elevator was cleaned on an "as-needed" basis. In addition to sweeping the floors of the elevator, cleaning was also done by "blowing-down" the machinery with compressed air to get rid of dust accumulations. The "blow-down" was not done in the immediate vicinity of machinery that was running. West told the investigators that there was neither a permanently assigned sweeper nor a permanently assigned oiler.

5. The following is a general description of the way Respondent's elevator operated. Grain enters the elevator from railroad cars through receiving pits which empty onto a conveyor belt which transports the grain into an elevator boot. The boot is located in the basement of the elevator and two legs extend vertically up to the elevator head where the grain is distributed by conveyor belt to various elevator bins. The legs contain a rubber belt with either metal or plastic buckets bolted to the belt which scoop up incoming grain out of the boot and elevate it to the elevator head. At the head, the grain is emptied out of the buckets into a bin and then through a spout which directs the grain onto a conveyor belt. The belt then moves the grain through a gallery where the grain is deposited into storage bins. In the basement area of the elevator is a tunnel which also contains a conveyor belt where grain is deposited from the storage bins located above the belt. Grain is removed from

the elevator by the conveyor belt in the tunnel which transports the grain back to the boot which lifts the grain into bins used for the purpose of loading railroad cars.

6. The boot and head areas of the elevator can become very dusty due to the loading and unloading of grain into and out of the buckets. The conveyor belts and other equipment in the elevator have many sets of bearings which must be lubricated on a regular basis to avoid overheating.

7. During the opening conference, Sobolewski, Miner and West were joined by Dave Wahl, the union steward. After completing the opening conference, West and Wahl accompanied Sobolewski and Miner on a complete walk-around inspection

of the entire facility. This inspection included the basement, bin floor head house area, galleries, tunnels, and electrical room. The inspection lasted approximately five and one-half hours.

8. At the time of the inspection there were approximately 14 employees working throughout the elevator. During the inspection, Miner and Sobolewski took numerous photographs of the conditions they observed.

9. The investigators learned during the inspection that, in addition to the fire reported by the Minneapolis Fire Department on March 2, 1988, a second fire had occurred several days prior to March 2, 1988. The second fire also involved an overheated bearing. The first occurred in Gallery 4; the second fire occurred on the bin floor. All of the employees were evacuated from the elevator during the fire which occurred on March 2, 1988. In both cases, the "fire" consisted of smoke from a overheated bearing. There were no flames in either of the fires.

10. During the inspection, Sobolewski and Miner found substantial accumulations of grain, grain dust, and chaff in many areas of the elevator Specifically, the investigators observed the following conditions (evidenced by photographs):

a. grain and grain dust covered the floor and railing in the boot pit area;

b. between legs 3 and 4 and conveyor belt 3 in the basement, grain and grain dust at least 1/16-inch deep covered the floor;

C. alongside conveyor belt 3 in the basement, there was a layer of grain and grain dust approximately 5/8-inch deep on the cross braces of the belt and a dust collection pipe above the belt;

d. grain and grain dust approximately 5/8-inch deep on the top of the dust collection system near belt number 3 in the basement;

e. dust approximately one-half to one-inch deep on the head pulley drive motor in the basement;

f. accumulations of grain and dust under conveyor belt number 3;

g. accumulations of dust on a vertical feed shield and on the conveyor belt frame;

h. several of the areas where dust was found also had

spider webs attached to the supports and braces intermingled with the dust;

i. the dust observed was of different colors and consistencies, indicating that the dust had not been removed for a length of time and had been deposited in layers at different times;

j. on several horizontal beams and pipes, the dust was sloped at the angle of repose (indicating no more could accumulate without falling off);

k. in several areas around the conveyors, dust and grain had accumulated up to a 10-inch level, in some areas covering bearings, and almost abutting the bottom of the belt;

l. in the area of the tunnel number 4 conveyor, which was the only belt running at the time of the inspection, there was a grain and grain dust accumulation under the belt, on the conveyor braces, and dust was observed in suspension as a result of the belt being operated;

M. on the bin floor (above the storage bins), there was a 1/4-inch accumulation of grain and grain dust along the stairway, on the stair railing, on the floor, at the base of the leg dump, and on pipes extending horizontally through the area;

n. in gallery number 2, there was approximately eight to ten inches of grain and grain dust accumulation under the conveyor belt which, in some spots, was resting on the grain and dust, with some of its bearings covered; there were accumulations of grain and grain dust on the floor and around the conveyor belt in gallery number 1;

0. the electrical room, which was located on the bin floor, had the entry door open due to a broken automatic closing device which had been broken since 1981;

p. there was a layer of grain and grain dust on the floor of the electrical room, on the top of the cable raceway, and on the outside and inside of electrical boxes;

q. there was grain dust approximately 3/8-inch deep in the scale room.

11. A 100-foot electrical cord was being used in the head house running from a power outlet to a purging unit which was an ordinary, household extension cord. It had several areas of worn insulation and a cracked and altered plug. Two electrical junction boxes located in the head house did not have covers on them and the electrical wiring was exposed. The junction boxes were not approved for a class 2, division 2 location.

12. A junction box and electrical box located in the electrical room off of the bin floor were common hardware store type boxes and were not dust-tight.

Grain dust was found inside both the junction box and electrical box. Neither the junction box nor the electrical box were approved for a class 2, division 2 location. An employee enters the electrical room several times a day for the purpose of turning on and off the machinery and equipment used in the elevator.

13. The only OSHA 200 forms retained by Respondent at the elevator were records for 1987 and those forms failed to record all injuries that occurred in that year. These forms, which were required to be kept at Respondent's elevator pursuant to Minn. Rule 5210.0660, were not available at the time of the inspection because they had been destroyed in error during an office cleanup.

14. On the date of the inspection, an employee who had returned to work from an injury leave was oiling and greasing bearings on a conveyor belt. The investigators did observe another employee who began sweeping the bin floor area when they arrived in that location.

15. The tunnel area below the storage bins was the only area of the elevator which had no windows. The upper floors of the elevator had windows which were used for ventilation purposes.

16. In order for suspended grain dust to constitute an explosive atmosphere, there must be approximately 55 grams of dust per cubic meter. A general rule of thumb is that the atmosphere should be sufficiently dense so that you cannot see your hand extended at arms length in front of your face to achieve an explosive atmosphere. The investigators did not observe these conditions during their inspection.

17. If equipment malfunctions creating a high level of suspended dust and an initial explosion results from an ignition source, the shock of the explosion will cause latent dust throughout the facility to go into suspension and secondary explosions may result throughout the elevator. Consequently, a chain reaction explosion can result from an initial explosion in one isolated area of an elevator.

18. Mr. Miner took several samples of grain, grain dust and chaff from the elevator during his inspection. Testing showed that approximately 40% of the residue he collected contained particles less than 425 microns in size. Particles under 425 microns will support an explosion if suspended in the air in sufficient density. Tests run by the Minnesota Department of Agriculture on the samples showed that various concentrations of dust and chaff were contained in the samples but any definitive ratio of dust to large particles could not be determined due to the small size of the samples.

19. The conditions needed for an explosion to be created in a grain

elevator are an ignition source (spark or fire), sufficiently dense grain dust in the atmosphere (fuel), and confinement of the area. Grain elevator explosions due to grain dust accumulations are a recognized hazard in the industry.

20. All of the legs at the electrical steel grain elevator have vacuum-type dust collectors for the purpose of reducing the amount of ambient grain dust in the leg. Additionally, there is a fan in each tunnel in the elevator which provides ventilation.

21. On March 28, 1988, Sobolewski and Miner conducted a complete closing conference at Respondent's workplace and the facility was inspected. The investigators found that the elevator had been thoroughly cleaned but that the electrical violations noted during the first inspection had not been corrected.

2 2 . As a result of the inspecti on of Respondent's faci I ity on March 22
1 988, ci tations were issued on Apr i 1 4, 1 988 which are the basis for this
proceeding. The citations and penalties litigated in this case are as follows:

Citation 2, Item 1 - Willful

29 C.F.R. 1910.22(a)(1): Places of employment were not kept clean and orderly, or in a sanitary condition: There were numerous instances where dust accumulations on plant machinery, floor space areas, beams, pipes, electrical equipment and roof space were sufficient to fuel a fire or explosion. Instances as follows:

a. The basement work floor area and tunnels
b. The bin floor
C. Gallery #2
d. Gallery #1
e. The electrical room
f. The scale floor and scale house roof areas

Abatement Date: Immediately Upon Receipt

Penalty: $8,500.00

Citation 2, Item 2 - Willful

29 C.F.R. 1910.307(b): Equipment, wiring methods, and installations of equipment in hazardous (classified) locations were not intrinsically safe, or approved for the hazardous (classified) location, or safe for the hazardous (classified) location: There were numerous instances where electrical equipment did not meet the requirements for a Class II, Div. 2, locations:

a. The 100-foot electrical cord located in the Head House
b. Two junctions boxes located in the Head House
C. Junction boxes and electrical boxes located in the electrical room off the bin floor area

Abatement Date: Immediately Upon Receipt

Penalty: $4,250.00

Citation i, Item 1 - Nonserious

Minn. Rules 5210.0660 (1987): Records (OSHA form #200 and its predecessor OSHA forms #100 and #102) were not retained in the establishment for five years following the end of the year to which they relate: The OSHA 200 Log, nor equivalent 100 or 102 records were not retained to reflect the most recent five years of job related

injuries or illnesses.

Abatement Date: April 25, 1988

Penalty $0.00

These Citations were contested in a timely manner by Respondent.

23. In March of 1986, Respondent was issued Citations, both serious and nonserious, for housekeeping violations in its grain elevator at issue herein. Additionally, a serious Citation was issued for "open motor" violations. The Notice of Contest filed by the Respondent concerning the Citations was withdrawn by way of a letter dated August 17, 1987.

24. During a reinspection that occurred in 1987, the investigator found that the housekeeping violations which had been found in 1986 had been abated. In a decision of the Minnesota Occupational Safety & Health Review Board concerning an open motor violation at a different facility, the Board determined that open motors did not constitute a violation of OSHA standards as was the basis for the 1986 Citation issued to Respondent.

25. On June 5 of 1990, Mr. Miner conducted a followup inspection regarding the 1988 housekeeping citations. At that time, Mr. Miner found that
the facility was clean and no citations were issued.

26. Respondent ConAgra has approximately 150 grain elevators in the United States of which approximately 20 are located in Minnesota.

Based upon the foregoing Findings of Fact, and the reasons set forth in the Memorandum below, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

I. The Minnesota Occupational Health and Safety Review Board and the Administrative Law Judge have jurisdiction and authority to take the action proposed pursuant to Minn. Stat. 182.661, subd. 3; 182.664; and 14.50.

2. The Board gave proper notice of the nearing in this matter and the Complainant and the Board have fulfilled all substantive and procedural requirements of law or rule.

3. Respondent is an employer as defined by Minn Stat. 182.651, subd . 7 .

4. On March 22, 1988, Respondent violated 29 C.F.R. 1910.22(a)(1), as set forth in finding 22 above. This violation was willful. The proposed penalty of $8,500.00 is appropriate and reasonable.

5. On March 22, 1988, Respondent violated 29 C.F.R. 1910.307(b), as set
forth in Finding 22 above. This violation has not been shown to be willful, however, but rather is a serious violation. A penalty of $850.00 is appropriate and reasonable for this violation. The Judge specifically concludes that the conditions cited which resulted in this violation were present in a class 2, division 2 location.

6. On March 22, 1988, Respondent violated Minn. Rule 5210.0650, as set

forth in Finding 22 above. This is a nonserious violation.

7. The Memorandum below is incorporated by reference herein.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

DECISION

1. Item I of Citation No. 2 is AFFIRMED as a willful violation.

2. Item 2 of Citation No. 2 is AFFIRMED as a serious violation.

3. Item I of Citation No. 3 is AFFIRMED as a nonserious violation.

4. Respondent shall pay forthwith to the Department of Labor and Industry the sum of $9,350.00.

Dated this 20th day of May, 1991.

PETER C. ERICKSON
Administrative Law Judge

Reported: Taped, Transcript Prepared by Karen Toughill.

MEMORANDUM

The housekeeping standard violated in this case, 29 C.F.R. 1910.22(a)(1), requires: "All places of employment, passageways, storerooms, and servicerooms shall be kept clean and orderly and in a sanitary condition." The conditions found by the investigators are set forth in detail in the Findings above. At the time of the inspection, most areas of Respondent's elevator were very dirty with various levels of grain dust and grain covering the floor, the machinery, and most horizontal surfaces, including ducts and support beams. Spiderwebs were intermingled with the dust and grain showing that cleaning had not taken place for some time. In addition, grain dust and residue were found inside junction boxes and the electrical box in the electrical room. At the time of the inspection, the plant was not shut down for cleaning and one belt in a basement tunnel was being operated. The different consistencies and levels of the residue showed that the dirty conditions were not the immediate result of operations which had just been suspended.

Respondent focuses its argument to rebut the housekeeping violation on

the fact that it changed its plant superintendent after the' 86 citations were issued and that its housekeeping policies were changed, resulting in a much cleaner facility. Respondent points out that an '87 inspection, the March 28, 1988 reinspection, and a 1990 inspection resulted in no housekeeping citations being issued to Respondent. However, the conditions found by the investigators on March 22, 1988 belie Respondent's assertion that its problems with housekeeping have been corrected or should mitigate the violation herein. The pictures taken by the investigators which were entered into the record of this case show clearly that Respondent's grain elevator was very dirty on March 22, 1988 and that these conditions could ngt have resultel if housekeeping practices were satisfactory.

The real issue in the housekeeping citation is whether the violation should be classified as "willful" or something less onerous (serious, nonserious or de minimus). In order to establish a willful violation, the Complainant must show that: (1) the Employer has committed a violation of the Act, and (2) the violation was committed voluntarily with intentional disregard for or plain indifference to the Act's requirements. Western Waterproofing, I,;. v. Marshall, 579 F.2d 139, 142 (8th Cir. 1978), cert,_den. 439 U.S. 965, 99 S. Ct . 452 (1 978) ; George, Electric Co. y . Marshall , 595 F.2d 309, 317 (5th Cir. 1979); National Steel and Shipbuilding Co. v. OSHRC, 607 F.2d 311, 314 (9th Cir. 1979); Al Schonek & Company Inc. v. Donovan , 646 F.2d 799 (2nd Cir. 1981). The Complainant, however, is not required to establish a bad motive on the part of the employer. In Intefcounty Construction Co. v.. OSHRC, 522 F.2d 777, 779-80 (4th Cir. 1975), cert. den. 423 U.S. 1972, 96 S. Ct. 854 (1976), the circuit court held:

> that "willful" means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision is described as willful "regardless of venial motive."

Moreover, the court in Intercounty-Constroction Co. held, regardless of any good faith belief that the work area remained safe, when a company knowingly chooses not to comply with the OSHA regulations and requirements, that decision is a willful action in violation of the law. it. at 780; George Electric-Co. Y. Marshall, 595 F.2d at 317: Natiional Steel and Shipbuilding_Co. v. OSHRC, 607 F.2d at 315. Similarly, the Eighth Circuit Court of Appeals he 1 d i n Western Waterproofing Co., that a 1 though the employer wa s we 1 1 aware of the requirements of the standards, it "substituted [its] own judgment for the provisions of the standards and therefore cannot escape the conclusion that they acted voluntarily with either intentional disregard of, or plain indifference to, the requirements of the Act. The regulations allow no such unbridled discretion." 579 F.2d at 143.

Respondent argues that because it had established new housekeeping

practices subsequent to the 1986 citations, its good faith should insulate it from a willful violation. Respondent cites Albestos Textile Company Inc., 12 OSHC 1063 and DAn_Scuillo_ -Company Inc., 9 OSHA 1070, in support of its position. However, regardless of Any new housekeeping practices, the condition of the elevator on March 22, 1988 showed clearly that no housekeeping practices were in effect for some length of time before the inspection. Spiderwebs intermingled with accumulations of grain and grain dust and "crusty" grain dust next to horizontal surfaces establish that no cleaning had occurred for a period of time in many areas of the elevator.

The Judge has concluded that the housekeeping violation discussed above constitutes a willful violation of the Act. The conditions in the plant were more than obvious to all employees and the plant superintendent. Respondent had received a housekeeping citation in 1986 which it did not contest and was consequently aware of the requirements of the Act. Early in the month of the inspection, there had been two instances of overheated bearings, one requiring calling the fire department and the evacuation of the elevator, which should have made housekeeping a primary concern at that time. During the inspection, the investigators observed grain residue and dust up to and covering bearings

and abutting conveyor belts in some areas. Obviously, in this case, a deliberate decision was made by the management personnel at the electric steel elevator to not comply with both housekeeping practices and the requirements of the Occupational Safety and Health Act. This decision was made despite the potential, recognized hazard of explosions in grain elevators where grain dust is allowed to accumulate. Indifference to employee safety has been clearly shown.

The electrical violation herein is based on the requirements contained in 29 C.F.R. 1910.307(b) which provide that "equipment, wiring methods, and installations of equipment in hazardous (classified) locations shall be intrinsically safe, approved for the hazardous (classified) location, or safe for the hazardous (classified) location." The citation states that the location at issue herein was a class 2, division 2 (hazardous) location. 29 C.F.R. 1910.399(25)(ii) defines a class 2, division 2 location as a location in which: (a) combustible dust will not normally be in suspension in the air in quantities sufficient to produce explosive or ignitable mixtures, and dust accumulations are normally insufficient to interfere with the normal operation of electrical equipment or other apparatus; or (b) dust may be in suspension in the air as a result of infrequent malfunctioning of handling or processing equipment, and dust accumulations resulting therefrom may be ignitable by abnormal operation or failure of electrical equipment or other apparatus. In this case, the head house and electrical room, where the violations herein were found, are in close proximity to the elevator leg which could produce a high level of suspended dust if the bucket operation were to malfunction. The investigators observed a layer of dust in the electrical room, inside the junction boxes and electrical box, and head house. The Judge has concluded that the areas in question herein are hazardous, division 2, class 2 locations. See, ConAgra, Inc., 12 O.S.H. Cas. (BNA) 1385, 1984-1985 O.S.H. Dec. (CCH) paragraph 27,296 (1985). The electrical cord, junction boxes and electrical box were all unsafe in the condition found because they could serve as an ignition source in a potentially explosive atmosphere.

The Judge has concluded that the electrical violation discussed above is not a willful violation but rather is a serious violation within the meaning of Minn. Stat. 182.651, subd. 12. That statutory provision defines "serious violation" as a violation which creates a substantial probability that death or serious physical harm could result from a condition which exists Obviously, if one of these electrical components were to be the ignition source for an explosion at the elevator, death or serious bodily injury would result to any employees in the elevator at that time. The Judge has determined that the electrical violation is not willful because there was no similar electrical citation which put the employer on notice of the requirements of the Act; and the basis for the hazardous location citation is really the housekeeping violation, which was already determined to be willful. The Judge simply does not find the same deliberateness with respect to the electrical violations. Consequently, the "willfulness" factor was taken out of the penalty calculation for the electrical violations resulting in a penalty of $850.00.

P.C.E.

IThe Judge points out that 29 C.F.R. 1910.272, adopted subsequent to the inspection in this case, requires that the employer shall "immediately" remove combustible dust particles whenever they exceed one-eighth inch at priority housekeeping areas. Those areas include floor areas within 35 feet of inside bucket elevators. 1910.272(i)(A) and (ii).